Digitized by the Internet Archive
in 2010 with funding from
University of North Carolina at Chapel Hill

http://www.archive.org/details/schoollawbulleti1431983univ

ARCHIVAL COPY. DO NOT
REMOVE FROM LIBRARY

School Law Bulletin
Vol. XIV, No. 3
July 1983
Institute of Government
The University of North Carolina at Chapel Hill
Editor
Robert E. Phay

RECEIVED
AUG 23 1983
INSTITUTE OF GOVERNMENT
UNIVERSITY OF NORTH CAROLINA
LIBRARY

Legal Issues in School Health: Part II

Anne M. Dellinger

Part I of this article appeared in the last issue of the School Law Bulletin. *It covered state statutes on school health, health education, immunization, ability to participate in activities, communicable disease, and child abuse and neglect. Part II discusses privacy issues in school health.*

IN ASSESSING SCHOOL HEALTH PROBLEMS, it is the privacy issues that seem most difficult ethically as well as legally—and the difficulties are real. First, a significant proportion of young people's health problems are potentially stigmatizing. Pregnancy out of wedlock, substance abuse, and sexually transmitted diseases all have a high incidence among persons aged 15 to 19 and, to a lesser degree, the next youngest cohort. Second, their youth makes it particularly necessary for students to take their problems to others and also particularly important that the problems be handled in a manner that minimizes detrimental effects on the students' future. Third, schools often face situations in which the duties to preserve the special confidential relationship with students, to communicate with students' families, and to protect other students and the community conflict with one another. Fourth, various kinds of school employees often perceive themselves as having differing loyal-

(continued on page 9)

The author is an Institute faculty member whose fields include health law.

The Wall Between Preaching and Teaching in the Public Schools

Benjamin B. Sendor

FOUR YEARS AGO an article in the *School Law Bulletin* discussed the constitutionality of three kinds of religious activities in public schools: observances of religious holidays, meetings of student prayer clubs, and distribution of Bibles to students.[1] Court decisions issued since that article was published, plus the persistence of controversies over religion in public school,[2] suggest that a comprehensive guided legal tour of religious activities in the public schools would be timely.

Basic Principles

The First Amendment contains two distinct provisions about the relation between government and religion: the free exercise clause and the establishment clause. The Fourteenth Amendment extends these limits on governmental power to state and local governments (including school districts).[3] The free exercise clause

The author is a new member of the Institute of Government faculty whose fields include school law.

1. Punger, *Religious Practices in the Public Schools*, 10 SCHOOL LAW BULLETIN 1 (Oct. 1979).

2. *See, e.g., Religion in Carolinas Classrooms Getting New Attention*, THE CHARLOTTE OBSERVER, Dec. 20, 1982, p. 1 (reporting several incidents of religious activity in public schools, including Bible classes in Reidsville, N.C., films about religious holidays shown in an elementary school near Wilmington, N.C., and distribution of the New Testament by Gideons in an elementary school in Oconee County, S.C.).

3. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215-16 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

forbids the government from prohibiting the free exercise of religion. Its goal is to keep religious beliefs and practices voluntary, free from government coercion.[4] The establishment clause forbids the federal government from making laws "respecting an establishment of religion." It not only prohibits a government from establishing an official public church but also reaches more broadly to prohibit public aid or support of religion, with the aim of separating church and state.[5]

To foster this goal, the Supreme Court has developed a three-part test to determine whether public school policies and activities comply with the establishment clause:

(1) Does the government policy or activity reflect a clearly secular purpose?
(2) Does the activity, as its primary effect, neither advance nor inhibit religion?
(3) Does the activity avoid excessive government entanglement with religion?[6]

A school policy or activity must pass all three parts of the test to survive a challenge under the establishment clause, and the test guides courts in their review, under the establishment clause, of religious activities in public school. It will serve as an analytic compass in this tour of the constitutionality of common religious activities in public school.

The constitutional debate about religion in the public schools historically has focused on the establishment clause rather than on the free exercise clause. This focus stems from the fact that by design most public school activities are optional in order to avoid claims under the free exercise clause that such activities coerce students into abandoning their own beliefs and practices. But the voluntary nature of an activity is irrelevant to establishment clause analysis. Even if all students in a class and their parents were to approve of and willingly engage in a religious activity, the activity still might run afoul of the establishment clause as improper government support of religion. As the Supreme Court repeatedly has observed, the optional nature of an activity might save a devotional practice from the Scylla of the free exercise clause, but it will not rescue the practice from the Charybdis of the establishment clause.[7]

4. 374 U.S. at 222-23.
5. Schempp, 374 U.S. 203.
6. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
7. Schempp, 374 U.S. at 220-23; Engel v. Vitale, 370 U.S. 421, 429-30 (1962).

School Prayer

Question: Is audible prayer or Bible reading by or for students constitutional when required or authorized by teachers or school administrators during the school day on school grounds?

Answer: No.

Discussion: The U.S. Supreme Court decisively grappled with the constitutionality of officially sanctioned, audible prayer in public school classrooms in 1962 in *Engel v. Vitale*[8] and again the following year in *School District of Abington Township v. Schempp*.[9] In *Engel* the Court struck down as a violation of the establishment clause the New York public schools' daily classroom recitation of a nondenominational prayer composed by the state government. The law that provided for the devotional permitted students to be excused from prayer upon parental request. In *Schempp* the Court held unconstitutional, under the establishment clause, a Pennsylvania statute requiring that at least ten Bible verses be read aloud to students without comment at the start of each school day and also a Baltimore policy requiring the recitation of either the Lord's Prayer or a chapter of the Bible without comment at the start of the school day. In both cases the Court found that the laws, policies, and practices at issue failed the first two parts of the three-part test: they had religious purposes, and they advanced the religious beliefs contained in the Bible and in the challenged prayers.

In both cases the Court rejected the assertion that the excusal provisions saved the prayers and the Bible readings. As discussed above, the Court explained that while an effective excusal policy might prevent a religious practice from violating the free exercise clause, it would not save the activity from being a violation of the establishment clause.

Since the *Engel* and *Schempp* decisions, courts across the nation have reviewed statutes and policies that provide for school prayer, only with greater voluntariness than the policies rejected in those cases. For example, in *Kent v. Commissioner of Education*,[10] the Supreme Judicial Court of Massachusetts reviewed a statute requiring teachers to announce at the beginning of each school day a period of prayer to be led by a student

8. Engel, 370 U.S. 421.
9. Schempp, 374 U.S. 203.
10. ____ Mass. ____, 402 N.E.2d 1340 (1980).

COPYRIGHT 1983. Published by the Institute of Government, Knapp Building 059A. The University of North Carolina at Chapel Hill, NC 27514. Printed in the U.S.A. Published quarterly. Subscription rate: $10 per year. Single issues, $2.50. Back issues are available from the publisher or from University Microfilms International, 300 North Zeeb Road, Dept. P.R., Ann Arbor, Mich. 48106.

volunteer; the law contained an excusal policy. In *Karen B. v. Treen*,[11] the United States Court of Appeals for the Fifth Circuit faced a Louisiana statute authorizing local school boards to permit school officials to allow each classroom teacher to ask at the start of the school day whether any student wished to offer a prayer. If no student volunteered, the statute permitted the teacher to do so. It too had an excusal provision. In *Collins v. Chandler Unified School District*,[12] the United States Court of Appeals for the Ninth Circuit reviewed a policy in an Arizona high school that permitted student council officers to conduct student assemblies in the auditorium during the school day and to begin the assemblies with a prayer. School officials coordinated class schedules to accommodate the assemblies. Attendance at the assemblies was optional; students who did not attend were assigned to study hall.

In all three of these cases, the courts declared the challenged practices unconstitutional under the establishment clause, finding that the activities failed all parts of the three-pronged test. They also rejected the argument that the optional nature of the practices should save them from being constitutional violations. Heeding the Supreme Court's lesson in *Engel* and *Schempp*, the courts explained that the voluntary nature of a religious practice does not shield the activity from the establishment clause.

One final point, often lost in the heated debate over school prayer: Courts have not banished prayer from the schools, as some critics have charged. They have forbidden only officially sanctioned or sponsored prayer. The establishment clause does not prohibit a student from praying silently or audibly on his own free time during the school day (such as during lunch or recess), provided his prayer is totally voluntary and unofficial and he does not interfere with other students, teachers, or official school activities. A student on his own time during the school day has as much a right to pray privately as he has to discuss a coming test or last night's baseball scores.

Moment of Silence

Question: Is an officially sanctioned moment of silence at the start of the school day constitutional?

Answer: There is no clear answer at this time to that question, although most courts addressing the issue have struck down moment-of-silence policies.

Discussion: In his concurring opinion in *Schempp*, Justice Brennan suggested that while officially sanctioned audible prayer in public school is unconstitutional under the establishment clause, an officially sanctioned moment of silence might pass muster. He commented that a quiet moment at the beginning of the day might usefully serve to "still the tumult of the playground and start a day of study."[13] Since Justice Brennan's observations, judicial opinion has been split concerning the constitutionality of official moments of silence in school. In *Gaines v. Anderson*,[14] a federal district court upheld a Massachusetts statute and a related school board resolution requiring teachers to enforce a period of silence to last not more than one minute at the start of the day "for meditation or prayer." The court analyzed the rule under the first two prongs of the three-part establishment clause test. First, it examined the legislative history of the statute and concluded that the law had a neutral, secular purpose of promoting a reflective atmosphere for study, self-discipline, and respect for authority. The court explained that meditation is not necessarily religious—it encompasses serious reflection about either religious or secular topics. It further noted that the statute's reference to prayer was not constitutionally fatal because it was used in the disjunctive, giving students a choice between meditation and prayer. It then ruled that the enforcement of the statute, accomplished without suggestions from teachers about the appropriate use of the period of silence, neither advanced nor inhibited religion as its primary effect.

In contrast, courts in three recent cases stuck down moment-of-silence statutes. In *Jaffree v. Wallace*[15] the Eleventh Circuit invalidated a statute authorizing teachers to begin the first class of the day with a minute of silence "for meditation or voluntary prayer . . . ." The court focused on the intent of the law, finding that the legislative history and the use of the word "prayer" indicated that the law was passed for the religious purpose of returning prayer to the schools.

In *Duffy v. Las Cruces Public Schools*[16] a federal district court held unconstitutional a New Mexico statute that authorized school boards to permit a moment of silence at the start of each day "for contemplation, meditation or prayer . . . ." As in *Jaffree* and *Beck* (below), the court ruled that the legislative history and the use of the word "prayer" showed that the law was enacted to bring prayer back to the public schools. The court found that the statute would promote prayer as its primary

11. 653 F.2d 897 (5th Cir. 1981).
12. 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981).
13. 374 U.S. at 281 (Brennan, J., concurring).
14. 421 F. Supp. 337 (D. Mass. 1976) (three-judge court).
15. 705 F.2d 1526 (11th Cir. 1983).
16. 557 F. Supp. 1013 (D.N.M. 1983).

effect because the public—particularly impressionable children—would perceive the period of silence as a devotional exercise. Finally, the court decided that the statute would unduly entangle the government in religion through teacher enforcement of the law and political discord in local school districts over the purpose and implementation of the statute.

In *Beck v. McElrath*[17] a federal district court struck down a statute nearly identical to the one upheld in *Gaines*. The law required teachers to maintain a period of silence not to exceed a minute at the beginning of the day "for meditation or prayer or personal beliefs...." The court ruled that the statute scored failing grades on all parts of the three-part test. First, it examined the statute's legislative history and concluded that it was enacted to inject prayer into the public schools through the constitutional back door under the guise of meditation after the Supreme Court had closed the front door in *Engel* and *Schempp*. Second, it determined that the statute's reference to prayer, together with the absence of guidelines for neutral implementation of the statute by teachers, made it likely that the law's primary effect would be to encourage students to engage in religious exercise, thereby advancing religion. Third, the court ruled that both the freedom given teachers to interpret the statute and the use of public money to promote a religious exercise (the moment of silence) called for excessive government entanglement with religion.

The judicial conflict over period-of-silence policies leaves few clear guidelines for school officials. At a minimum, the review of the legislative history of the statutes challenged in *Gaines* and *Beck* indicates that courts are likely to declare periods of silence intended by either legislature or school boards as thinly veiled prayer to be unconstitutional. For example, in *Opinions of the Justices to the House of Representatives*,[18] the Supreme Judicial Court of Massachusetts held that a proposed bill to require teachers to conduct a period of prayer or meditation to be offered by a student volunteer would be unconstitutional. The court distinguished the bill from the statute upheld in *Gaines*, since it would permit a student to lead a class in audible prayer. Courts also are likely to strike down periods of silence implemented by teachers as religious exercises. For example, if a teacher in Massachusetts were to instruct students, "Be quiet for a minute to pray," even the *Gaines* court probably would declare that teacher's direction unconstitutional. It remains unclear, however, whether a moment of silence instituted solely for secular purposes and enforced by teachers without suggesting that students use the time to pray would be constitutional under the establishment clause.

17. 548 F. Supp. 1161 (M.D. Tenn. 1982).

18. 387 Mass. 1201, 440 N.E.2d 1159 (1982).

Student Prayer Clubs

Question: Is it constitutional for a public school to permit students to form extracurricular clubs to hold group prayer sessions?

Answer: Probably not.

Discussion: The constitutionality of student prayer clubs has been a thorny issue for courts and school officials in recent years. Thwarted by court decisions barring officially sanctioned prayer during class time, some students have sought permission to form extracurricular clubs to hold group prayer meetings. Before the Supreme Court's 1981 decision in *Widmar v. Vincent*,[19] a court in *Reed v. Van Hoven*[20] upheld a school policy to permit voluntary student prayer meetings for a few minutes before the start of classes, as long as the sessions were not held in homerooms and the teachers had no role in selecting the prayers. The court reasoned that such voluntary gatherings, separate from official school activities and from teachers' control over the content, were a lawful accommodation of government with religion. However, courts in three more recent cases—*Brandon v. Board of Educ. of Guilderland*,[21] *Johnson v. Huntington Beach Union High School Dist.*,[22] and *Trietley v. Board of Educ. of the City of Buffalo*[23]—agreed that extracurricular prayer clubs violated the establishment clause. They reached identical conclusions through slightly different analyses under the three-part test. The *Brandon* and *Johnson* courts ruled that policies permitting the clubs would have the secular purpose of demonstrating a neutral school attitude toward extracurricular activities. On the other hand, the *Trietley* court focused on the activity of a prayer club, rather than on the school extracurricular policy authorizing the formation of the club, and decided that the club's purpose was religious.

The three courts agreed that the clubs would violate the second and third parts of the test. They found that

19. 454 U.S. 263 (1981).

20. 237 F. Supp. 48 (W.D. Mich. 1965).

21. Brandon v. Board of Educ. of Guilderland, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

22. Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Cal. Ct. App. 1977), *cert. denied*, 434 U.S. 877 (1977).

23. Trietley v. Board of Educ. of the City of Buffalo, 65 App. Div.2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978).

the groups would, as their primary effect, advance the religious beliefs of their members. The courts also determined that the groups would require excessive entanglement of school officials with religion through teacher supervision for such purposes as ensuring safety and order, ensuring that activities during club meetings are voluntary, preventing discriminatory membership policies, and auditing club financial records.

In 1981 the Supreme Court muddied the constitutional waters by holding in *Widmar* that the First Amendment's guarantee of freedom of speech requires a public university in Missouri to allow students to form prayer clubs on campus. Though the university argued that the presence of prayer groups would violate the establishment clause, the Court ruled that allowing the clubs would pass the familiar three-part test. It first stated that opening a public university campus to prayer groups would serve a neutral, secular policy of maintaining the campus as an open forum for the exchange of ideas. The Court then held that any benefits to religion would be merely "incidental" consequences rather than primary effects of the clubs, because "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices"[24] and because any impact of such a club on a campus with over 100 recognized student groups would be minimal. Significantly, the Court noted with regard to the effect of university prayer groups, "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[25] Third, the Court found that excluding religious clubs from a public university campus would risk greater entanglement than admitting them, because such an exclusion would mean that all extracurricular groups would have to be policed to ensure that they do not engage in religious activities. The Court also noted that college students often live on campus, with little chance of finding suitable places to worship off campus.

What is the impact of *Widmar* on the constitutionality of public school prayer clubs? At first glance, it may seem that *Widmar* overrules *Brandon*, *Johnson*, and *Trietley*. Indeed, in *Bender v. Williamsport*[26] a federal district court in Pennsylvania held that *Widmar* applies with equal force to public high school prayer clubs. That court ruled that students' freedom of speech under the First Amendment entitled them to meet for prayer, rejecting the school district's argument that allowing prayer groups to meet would violate the establishment clause. Using the three-part test, the court decided that (1) allowing the club to meet would serve the secular purpose of maintaining an open, neutral extracurricular policy; (2) high school students are mature enough not to interpret the school's acceptance of the club as tacit endorsement of the groups' religious doctrines and practices; and (3) teacher supervision would entail no more governmental entanglement with religion than a policeman's patrolling of a religious rally in a public park.

The United States Court of Appeals for the Fifth Circuit took the opposite tack, ruling in *Lubbock Civil Liberties Union v. Lubbock Independent School District*[27] that even after *Widmar* prayer meetings in public schools violate the establishment clause. Also using the three-part test, the court decided first that the school district's policy authorizing prayer meetings was not merely a neutral policy granting equal, open access to extracurricular groups; rather, it was part of comprehensive policy concerned with religious activities in school, and the school board's purpose in promulgating the policy was to promote religious meetings. The court then concluded that the policy's primary effect was to advance religion. It reasoned that allowing prayer meetings as part of an official extracurricular program would imply official approval of the meetings to impressionable elementary and secondary school children.[28] The court distinguished *Widmar* as applying to more mature college students. Finally, it ruled that the policy entailed excessive governmental entanglement with religion through the teacher supervision required to protect school property and ensure that the activities of prayer clubs were voluntary.

As the conflicting *Bender* and *Lubbock* decisions demonstrate, *Widmar* leaves the law about extracurricular prayer clubs in public schools unclear. It appears from the judicial tea leaves left by *Widmar* that the Supreme Court would strike down prayer clubs below the college level. The Court's observations in *Widmar* that college students are less impressionable than younger students and that college students living on campus

24. 454 U.S. at 274.
25. *Id.*, n. 14.
26. No. 82-0692 (M.D. Pa., filed May 12, 1983).

27. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983).
28. A distinction based on the age of the audience is familiar in establishment clause analysis. For example, although officially sanctioned audible prayer at the start of a school day is unconstitutional, courts have ruled that legislatures and public governing boards may begin their sessions with prayer. *See, e.g.*, Chambers v. Marsh, 51 U.S.L.W. 5162 (U.S. July 5, 1983); Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979); Voswinkel v. City of Charlotte, 495 F. Supp. 588, 597 (W.D.N.C. 1980); Colo v. Treasurer and Receiver General, 398 Mass. 550, 392 N.E.2d 1195 (1979); Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968).

often have no suitable off-campus alternative for group prayer suggest that it would distinguish between colleges and public schools. In addition, the Court denied certiorari in both *Brandon* and *Lubbock* after its decision in *Widmar*, allowing those decisions to stand on the heels of *Widmar*. In short, it is probable, though hardly certain at this time, that extracurricular prayer clubs in public schools violate the establishment clause.

Try a factual twist on the prayer club cases: Would it be constitutional to allow students to meet in prayer groups that are independent of a school's official extracurricular program? For example, could students form a prayer group that met at the school during evening, nonschool hours? The answer, perhaps surprisingly, probably is yes. Courts around the country have upheld policies permitting religious congregations to use school facilities for worship during nonschool hours on the same basis as nonreligious groups. In *Country Hills Christian Church v. Unified School District No. 512, Shawnee Mission, Kansas*[29] and *Resnick v. East Brunswick Township Board of Educ.*,[30] those courts have ruled that such policies have the secular purpose of maintaining school facilities as open forums for community activities during nonschool hours, that activities under such policies are sufficiently divorced from the official activities during the school day to avoid the implication of official school support, and that such open-door policies require no entangling supervision. Accordingly, students who may not meet in official extracurricular prayer groups during the school day nevertheless should be able to meet on school grounds for prayer if their groups meet wholly independently of the official school curricular and extracurricular program.

Graduation Prayers

Question: May public schools conduct graduation ceremonies with prayers as invocations or benedictions?

Answer: Probably yes.

Discussion: Although prayer used as an invocation or benediction in public school graduation seems to resemble prayer used to start regular school days rather closely, courts have upheld graduation prayer. In *Grossberg v. Deusebio*[31] a federal district court upheld the use of prayer for an invocation at a Virginia high school graduation. Attendance at graduation was voluntary, and the senior class paid the expenses of the ceremony and decided whether to include an invocation in the program. The court acknowledged that an invocation is a religious act with the effect of advancing religion and that a graduation ceremony held on school grounds is an official public school event. But it distinguished graduation invocations from the prayers in those cases struck down in *Engel* and *Schempp* by noting that the forbidden prayers were part of the regular curricular program, supervised by teachers, with the purpose of supporting religious principles. In contrast, the court stated, a graduation invocation is not a repetitive part of the year-long school program, and the overall graduation is a ceremonial rather than educational or religious activity. No state funding was required for this commencement exercise and the invocation lasted only a few minutes, posing "only a shadow of a danger" and causing no significant appearance of government support for religion.

In *Wood v. Mt. Lebanon Township School District*[32] and *Weist v. Mt. Lebanon School District*,[33] courts upheld the use of both invocation and benediction prayer in a graduation. In both cases, as in *Grossberg*, attendance at the graduation was voluntary. However, the school board adopted the program for the ceremony. Consistent with *Grossberg*, the courts explained that graduation prayer was not part of the formal daily curricular routine enforced through compulsory attendance and was at worst a harmless "technical infringement." The federal district court declared in *Wood* that the prayer had a secular purpose of permitting "customary remarks."

These cases appear to be inconsistent with the school prayer cases. Using the three-part test, it seems clear, first, that regardless of the secular, ceremonial purpose of a graduation as a whole, a prayer uttered during the ceremony undeniably has a religious purpose: to invoke divine blessing. Second, the primary effect of prayer during an official school function is to incorporate religious faith into the ceremony, thereby implying official support of religious doctrine and advancing religion. Third, prayer either selected or approved by school officials entails considerable government entanglement in religion. In addition, the voluntary nature of a graduation as a whole does not save one of its component activities from violating the establishment clause. Furthermore, it is incorrect under establishment clause analysis that a short graduation prayer is at worst a "technical infringement," posing "only a shadow of a danger." As the Supreme Court observed in *Schempp*, "it is no

29. No. 82-2345 (D. Kan. filed Mar. 29, 1983).
30. 77 N.J. 88, 389 A.2d 944 (1978).
31. 380 F. Supp. 285 (E.D. Va. 1974).
32. 342 F. Supp. 1293 (W.D. Pa. 1972).
33. 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974).

defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent."[34] Despite the conflicts between cases that permit graduation prayer and cases that prohibit official prayer during the official school day, courts seem willing to give a tolerant constitutional wink at graduation prayer.[35]

A situation similar to prayer during graduations is prayer during school athletic events—for example, as an invocation or during half-time at high school football games. No published cases appear to have addressed this issue. In the spectrum between prohibited and permitted religious practices, such prayer seems to fall between graduation prayer and officially sanctioned prayer during the regular school day. Like graduation ceremonies, sporting events are separate from instruction and the school day, and attendance is voluntary. However, unlike graduations, athletic events are regularly recurring functions. Considered under the three-part test, prayer at athletic events has a religious purpose, it implies the school's approval of the religious message of the prayer, and it entangles school officials with religion through planning and approving the prayer.

Religious Symbols

Question: May religious symbols be displayed in public school facilities?

Answer: Yes, if they are displayed to teach students about society's religious heritage rather than to show official support for religious beliefs.

Discussion: Just as the establishment clause prohibits officially sanctioned prayer as inappropriate public support for religious doctrine, so it prohibits the display of religious symbols in school to advance religious doctrine. The key questions are whether particular symbols are religious and whether they are displayed in a religious manner. In *Stone v. Graham*,[36] the United States Supreme Court addressed a Kentucky statute requiring the posting of the Ten Commandments in classrooms. The Court struck the statute down under the establishment clause, explaining that the first four commandments (dealing with duties toward God) make the Ten Commandments a sacred text.

Determining whether a particular symbol is "religious" can be a vexing challenge for a school official. For example, in *Florey v. Sioux Falls Schools District 49-5*,[37] the United States Court of Appeals for the Eighth Circuit upheld a school board policy that permitted the use of religious symbols like crosses, menorahs, crescents, Stars of David, creches, and symbols of Native American religions—"provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature." The court explained its decision within the framework of the three-part test. First, it said that the policy's secular purpose was to enhance students' knowledge of their religious and cultural heritage rather than to promote religious doctrine. It noted that the Supreme Court had commented in *Schempp* that the establishment clause does not prohibit the study of religion "when presented objectively as part of a secular program of education."[38] Second, the court concluded that school personnel in fact carried out the policy to achieve the primary effect of improving students' appreciation of their heritage rather than to spread religious doctrine. Third, it determined that the policy minimized government entanglement with religion by providing administrators and teachers with guidelines for deciding whether particular symbols are religious or secular.

Taken together, *Stone* and *Florey* are likely to cause confusion, controversy, and frustration for school officials and citizens in determining whether particular symbols are religious or secular. At the least, school districts that permit the display of religious symbols should be careful to anchor them in a secular instructional context.

Holiday Observances

Question: May a school observe religious holidays through activities involving music, art, literature, and drama?

Answer: Yes, if such activities are undertaken for the secular purpose of teaching students about society's religious heritage.

Discussion: In *Florey* the Eighth Circuit Court also addressed the constitutionality of the school district's

34. 374 U.S. at 225.

35. Courts have shown similar willingness to bend the establishment clause on other issues, such as invocations for legislative and public governing board sessions, the use of the motto "In God We Trust" on U.S. coins, and the reference to God in the pledge of allegiance. Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); Voswinkel v. City of Charlotte, 495 F. Supp. 588; Colo v. Treasurer, 398 Mass. 550. Despite their religious content, such practices generally are upheld as secular—merely ceremonial and sapped of their devotional content over the course of history.

36. 449 U.S. 39 (1981).

37. 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

38. 374 U.S. at 225.

policy permitting public schools to observe holidays "which have a religious and a secular basis," expressly including Christmas, Easter, Passover, Chanukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween. Observances included the singing of Christmas carols. The court used the same three-part analysis it used to assess the constitutionality of the display of religious symbols and upheld the holiday observance rules.[39] It contrasted the secular goal of the policy with an example of an unconstitutional application of that policy: a Christmas quiz for kindergarten classes in which correct answers required students to acknowledge Jesus as their saviour and to state that angels saluted his birth in song.

Bible Distribution

Question: May school officials arrange or permit the distribution of Bibles to students on school grounds during the school day?

Answer: School officials may neither distribute Bibles to students nor authorize others to do so. It is not clear whether officials may permit others to leave Bibles in a school for students to take as they please.

Discussion: Until 1978 courts around the nation unanimously vetoed the common practice of allowing representatives of groups like the Gideons to distribute Bibles to school children (*Tudor v. Board of Educ.*,[40] *Hernandez v. Hanson*,[41] *Goodwin v. Cross County School District*,[42] and *Brown v. Orange County Board of Public Instruction*[43]), holding that Bible distribution plainly serves the religious purpose of spreading Biblical doctrine to students, conveys the appearance of official support for these doctrines, and uses school facilities as the vehicle for distributing a religious text. This unanimity was broken in *Meltzer v. Board of Public Instruction of Orange County*.[44] In that case, the school district involved in *Brown v. Orange County* tinkered with its policy, permitting the local Gideons simply to leave Bibles on a table for students to take if they wished. The United States Court of Appeals for the Fifth Circuit upheld the new policy without explanation in an equally divided decision. Thorough scrutiny under the three-part test would suggest that the policy fails all three parts: it serves a religious purpose of facilitating the dissemination of religious doctrine; it may appear to put the official stamp of approval on that doctrine; and it permits the use of school facilities to spread that doctrine. Although *Meltzer* shows that at least one court has tolerated the "passive" approach to Bible distribution, it is hardly a decision on which school officials may confidently base a policy.

Conclusion

The Supreme Court's early opinions about devotional activities in public school in *Engel* and *Schempp* initially appeared clear and decisive. Regardless of public opinion about the wisdom of those decisions, at least they seemed to establish comprehensible guidelines about the question of school prayer. However, inconsistencies have developed in judicial review of other school religious activities since those decisions. Courts in some cases strictly scrutinize practices to enforce the establishment clause vigorously. In other cases courts seem willing to permit considerable government accommodation of religious activity. The three-part test is helpful, but judicial manipulation of the test occasionally undermines its value.

Beyond the three-part test, a few analytic themes emerge from the cases discussed in this article. First, regardless of the religious content of an activity, courts are more likely to give it a passing constitutional grade if it is instituted and implemented in a secular context (e.g., activities designed for historical, literary, or cultural instruction) or if it falls within the category of religious practices deemed by judicial fiat to have become traditional secular customs (e.g., graduation prayer and holiday observances). In addition, school activities are more likely to survive to the extent that they are independent of the regular school routine (e.g., graduation prayer and student prayer clubs that are not part of the official curricular or extracurricular program). Finally, although voluntariness is irrelevant to establishment clause analysis, courts that have upheld religious activities nonetheless often have cited their voluntary nature as significant factors in the court's decision.

Judicial inconsistency is frustrating to school officials on the firing line who need clear guidelines to make sound decisions. Officials must work closely with their attorneys to heed judicial precedent when it is clear and to analyze issues under the general principles developed by the courts when no clear precedent lights the way.

---

39. The court sidestepped the question whether Christmas carols are religious in modern America. Instead, it observed that carols have assumed a cultural significance justifying their inclusion in public school education. The court reasoned that when an activity serves a primarily secular purpose, the inclusion of religious content does not make it unconstitutional.

40. 41 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

41. 430 F. Supp. 1154 (D. Neb. 1977).

42. 394 F. Supp. 417 (E.D. Ark. 1973).

43. 128 So.2d 181 (Fla. Ct. App. 1960).

44. 577 F.2d 311 (5th Cir. 1978) (*en banc*) (*per curiam*), *cert. denied*, 439 U.S. 1089 (1979)

Legal Issues in School Health

(continued from page 1)

ties, and they behave accordingly. The law does not wholly clarify the obligations of school employees, and on some issues—the role of school nurses, for example—there may not even be consensus within the professional group affected. This article discusses the prevalence of certain health problems in the school population and the issues of counseling and record-keeping associated with those problems.

Stigmatizing Conditions

Pregnancy

One in five American teenagers has had sexual intercourse by age 15 and one in two by age 19. Although an increasing proportion use contraceptives, the pregnancy rate in this age group is also increasing—nationwide, 1.1 million pregnancies for the most recent year reported. Few pregnant teenagers are married (fewer than one-fifth of the 1.1 million), and it is estimated that eight in ten of those who are not married did not plan their pregnancy and do not want to give birth.[1] The problem is especially severe in this state. Some 26,000 North Carolina teenagers become pregnant each year (the state's fertility rate for girls between 13 and 17 is seventh highest in the nation[2]), though school units reported only a small fraction of these girls among their students (4,240 for the 1981-82 school year in North Carolina[3]). Possible explanations for the discrepancy include abortion,[4] the large number of pregnant teenagers who have already left school or drop out on learning they are pregnant, and the success of efforts to conceal pregnancy during the school year.

Caring for the girls who do remain in school during pregnancy may present a serious problem for school health services. A recent report notes:

> The medical risks associated with teenage pregnancy are well documented. Teenage mothers face greater risks of death, illness, and injury than do women who give birth in their 20's. The chances of a teen mother dying during pregnancy are three times that of an older woman. Toxemia, prolonged labor, iron-deficiency anemia, and stunted growth of certain bones are among the most common complications of teenage pregnancy . . . . For the infant born to teenage parents, risks are high. Babies born to young teens are two to three times more likely to die in their first year, and two times as likely to be premature and of low birth weight. The death rate in North Carolina in 1977 for infants born to women under 20 was 23 per 1,000 live births, about one-third higher than the overall rate of 15.8 per 1,000. Mental retardation, low I.Q., and a variety of birth defects also are associated with teenage pregnancy.[5]

Danger to mothers and babies increases because, perhaps in an effort to conceal the fact that they are pregnant, so many teenagers avoid early prenatal care.[6]

Until recently schools did not accept responsibility for the education of pregnant school girls. A survey made in 1969 in North Carolina revealed that it was regular practice to expel or suspend these girls. Two years later, on the advice of the Department of Public Instruction (DPI), the State Board of Education issued a policy statement encouraging their further education.[7] But not until federal regulations under Title IX of the Education Amendments of 1972[8] (which would cut off federal funds from schools that penalize pregnant students) were promulgated did the routine expulsion or suspension of these students stop.[9]

Since 1974, then, it has been clear that (1) a pregnant student has a continued right to attend school, and (2)

---

1. Teenage Pregnancy: The Problem That Hasn't Gone Away (New York: Allan Guttmacher Institute, 1980).

2. M. Chap, Teenage Pregnancy in North Carolina: Better Choices for a Better Future (Raleigh, N.C.: Governor's Advocacy Council on Children and Youth, 1980.

3. Statistics provided by Jack Knox, Controller's Office, North Carolina Department of Public Instruction, March 9, 1983.

4. There is one abortion for every 2.6 births in North Carolina. Milnor, *Abortion in North Carolina: Current Law and Prospects*, Health Law Bulletin No. 60 (Chapel Hill, N.C.: Institute of Government, December 1982).

5. Chap, *op. cit. supra* note 2, at 3.

6. More than 25 per cent of white and 40 per cent of nonwhite teenagers deferred care until the later stages of pregnancy. Update: Local Coalitions on Adolescent Pregnancy 6 (Raleigh, N.C.: Governor's Advocacy Council on Children and Youth, October 1981).

7. Presti & Glimps, *Pregnant Teenagers: Their Education Is Suffering*, 4 N.C. Insight 2 (September 1981). State Board of Education policy adopted February 4, 1971.

8. 20 U.S.C. § 1681 (1978).

9. 45 C.F.R. § 86.40 (1981). The regulations also prohibit placing pregnant students in separate programs or classes unless they request such placement.

10. 20 U.S.C. § 1401 (1) (1982).

the school may not discipline or otherwise burden her because of the pregnancy. But it is still not clear whether schools have an affirmative legal obligation to offer special help to such a student. Federal statutes that assure the educational rights of the handicapped do not include pregnant persons in the definition of "handicapped";[10] thus these girls are not entitled to the panoply of protections afforded by that legislation. But reference to state law may change the picture somewhat. North Carolina law on the education rights of "children with special needs" *does* include pregnant students within the protected group.[11] However, DPI takes the position that special services should not be offered to all pregnant students but only to those (presumably few) who show that they need them.

The statutory rights are rarely offered. During the 1981-82 school year, North Carolina administrators reported 4,240 pregnant girls in attendance at school. Fewer than one in 100 of these girls (407) was classified as "a child with special needs."[12] Moreover, DPI advises local units that statutory protection for pregnant students ends with delivery. Thus students who are recovering from childbirth are ineligible for homebound instructional services unless they remain out of school for medical reasons longer than four weeks.[13] There is other evidence that treatment of pregnancy is a problem in many school units. In a recent survey local health departments frequently mentioned "failure to deal with teen pregnancies" as a weakness of school health programs.[14]

Substance Abuse

Abuse of narcotics, especially of alcohol, is a serious health problem for young people in the United States. In a 1978 survey by the National Institute on Alcohol Abuse and Alcoholism, one-third of high school students classified themselves as heavy or moderate-to-heavy drinkers. The definitions of these two categories would indicate that this one-third of students drinks with disturbing frequency and volume.[15] Nor is the problem confined to high schools. Eleven per cent of 13-year-olds and 25 per cent of 15-year-olds put themselves in the same top categories of alcohol use. Drinking most seriously affects white males. One in five high school boys reported being a heavy drinker, compared with one in eleven girls. Black teenagers reported themselves as heavy drinkers only a third as often as whites; again, most heavy drinkers were boys.[16] While there are not separate data on teenagers in studies on drinking practices in North Carolina, the state ranks second in the nation in regard to incidence of alcohol-related chronic health problems in its general population.[17]

Students use other drugs besides alcohol, though far less often. The National Institute of Drug Abuse recently announced a decline in *daily* marijuana use among high school seniors from 10.7 per cent to 7 per cent between 1978 and 1981. The same study showed declining use of cigarettes, PCP, and tranquilizers, but little change in use of alcohol, cocaine (17% had ever used), barbiturates (11%), LSD (10%), and heroin (1%). Amphetamine use had increased sharply—from

11. N.C. Gen. Stat. § 115C-109 (1981 Supp.).

12. Statistics from the Department of Public Instruction, March 1983.

13. Initially, the Division of Exceptional Children declined responsibility for students who were pregnant but not otherwise handicapped. Presti & Glimps, *op. cit. supra* note 7, at 4-6. In 1980 the Attorney General issued an opinion ruling that "a local school system has the same legal responsibility to a pregnant student as to any other child defined by law as a child with special needs." Letter to Ruby Milgrom, Chairman, Governor's Advocacy Council on Children and Youth, September 30, 1980. The Division continues to advise that not all pregnant students are children with special needs. Questions and Answers About Exceptional Children 15-16 (Raleigh, N.C.: Department of Public Instruction, 1982). Perhaps one reason that fewer than one in 100 pregnant students is found to have such needs is that no one is responsible for initial assessment. The Division advises local units as follows: "When a student becomes pregnant and *it appears* that her educational needs cannot be met in a regular class, she should be referred to the appropriate principal or school-based committee" (italics added). No doubt more needs would come to light if every pregnant student were assigned to a principal or committee for investigation of her circumstances, as is done for the other categories of children with special needs. Legislation now being considered by the N.C. General Assembly (S 127) would delete the requirement for an individualized education program for every pregnant student.

14. Health Education in North Carolina: The Results of Two Surveys, Staff report to the Health Education Study Commission, February 1981, p. 24.

15. "Moderate/heavier drinker" is defined as one who drinks at least once a week, medium amounts per occasion, or three to four times a month, large amounts per occasion. Of the students surveyed, 17.3 per cent were in this group. "Heavier drinkers" drink a large amount at least once a week; 14.8 per cent placed themselves in this group. As defined, a medium amount is two to four drinks; a large amount is five or more drinks. A "drink" is 12 ounces of beer, four ounces of wine, or one ounce of distilled spirits. Fourth Special Report to the U.S. Congress on Alcohol and Drinking, January 1981. Several experienced school employees have suggested to the author that teenagers may overreport their own consumption. Since no data based on observation seem to be available, this suggestion cannot be validated.

16. *Id.*

17. Carlson, *Alcohol Problems Seem To Be More Widespread in the West*, Wall Street Journal, January 25, 1983, p. 35.

26 per cent in 1980 to 33 per cent in 1981. The proportion of seniors who admitted having used amphetamines in the preceding month rose from 12 per cent to 16 per cent in that year (1980-81).[18]

The ill effects of most drugs, certainly including alcohol, have been well known for a long time. Marijuana's reputation has been not been so well documented, however; therefore it is worth noting the latest indications of the health hazards that marijuana use may present. The National Academy of Science's Institute of Medicine reports inconclusive results; in fact, its five-year study found that most important questions about marijuana are unanswered. Still, the study proved the existence of certain health risks and the possibility of more serious ones.[19]

Besides the efforts made through health education, how should schools deal with students who use drugs? First, it may be helpful to recognize that the school is not legally constrained to follow one course or another, though knowledge of certain laws may influence the decision. Most school authorities will choose one or more of the following three courses of action:

To Impose School Discipline. Nearly all schools' rules forbid the use of alcohol and other drugs,[20] though naturally there are differences among units and from time to time within a unit in regard to enforcement. The school enjoys considerable latitude in setting penalties. For instance, it is agreed that even off-campus behavior is punishable at school if it affects the school. According to one writer,

> In general, schools may adopt rules that provide for serious punishment for students who wrongly use drugs and alcohol off campus since the abuse frequently has a direct and immediate effect on the school's general welfare.... Problems of proof may arise in establishing off-campus abuse of drugs or alcohol but the authority of schools to punish for such abuse seems clear.[21]

It is also clear that many courts are willing to uphold severe penalties imposed by school officials, even expulsion of first offenders.[22] The major limitation on schools' power in this regard is the courts' reluctance to approve penalties that are automatic and thus appear arbitrary. A school can be reasonably confident that penalties will be upheld if it considers the circumstances of each case, including mitigating factors, before reaching a decision.[23] Finally, school officials should understand that their disciplinary process is separate from the legal process. Schools are entitled to discipline students for events that may also be the subject of criminal prosecution—and it is not necessary for the school process to await the outcome of a trial or for the school's decision to be the same as the court's. In other words, with sufficient evidence to conclude that the student committed the offense and after a hearing process that was fair, a school board could legally suspend a student on the basis of events for which a district attorney chose not to prosecute or on which a judge acquitted.

To Call in Law Enforcement Authorities. The school's second choice is to call in police. From time to time school authorities seek police assistance in identifying drug users and sellers among their student bodies. To date the practice has withstood most legal challenges from parents and students. Two recent cases went so far as to uphold the use of trained dogs in massive searches for this purpose.[24] Since 1979 four North Carolina school units (Wake, Fayetteville, Cumberland, Hoke) have carried out, in cooperation with police, drug enforcement operations that in-

---

18. Russell, *Marijuana Smoking Off, Use of "Uppers" Increases*, The Washington Post, February 25, 1982, p. A.2.

19. The National Academy reports the following: (1) Marijuana affects the central nervous system, behavior, and mood, producing anxiety as well as euphoria. It is not known whether these effects are long-term and structural. (2) Marijuana affects heart, circulation, and lungs. Because the heart's work increases with such use, marijuana use is probably a threat to people who are prone to cardiovascular problems. It probably poses the same risk of emphysema and lung, throat, and mouth cancers as tobacco use does. (3) Marijuana affects the reproductive system, including chromosomes. Marijuana use lowers sperm production in humans. In animals it interferes with ovulation, crosses the placenta, and causes birth defects. It is not known whether it decreases human fertility or causes birth defects in humans. *Excerpts from the Federal Report on Marijuana*, The New York Times, February 27, 1982.

Schools or health departments may wish to order the National Academy report itself. It is entitled Marijuana and Health, and it is available at $11.25 a copy from the National Academy Press, 2101 Constitution Avenue N.W., Washington, D.C. 20418.

20. Drug use as a violation of school discipline so well recognized that it is an example of behavior for which written school policies (though desirable) are not legally required. *See* Wood v. Strickland, 420 U.S. 308 (1975), and Bd. of Educ. of Rogers, Ark. v. McCluskey, 102 S. Ct. 3469 (1982).

21. R. Phay, The Law of Suspension and Expulsion 55 (NOLPE: Topeka, Ks. 1975).

22. Phay & Winn, *Legal Authority for Schools and Colleges to Control Student Use of Drugs*, 2 School Law Bulletin (April 1976).

23. *Id.* at 5-6. *See also* Clarke County Bd. of Educ. v. Jones, 625 S.W.2d 586 (Ky. App. 1981), upholding the trial court's injunction against school board's automatic suspension for first alcohol use.

24. Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), 631 F.2d 91 (7th Cir. 1980); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

volved undercover agents in the schools and resulted in numerous arrests and prosecutions of students. In addition to these planned operations, whenever a student's involvement with drugs comes to their attention, school personnel must decide whether to turn the information over to the police. Certainly the school may do so; equally certainly, it is not required by law to do so.[25] The considerations to be weighed include possible harm and benefit to the particular student and to other students and the community. As soon as a school employee realizes that a student's case may eventually be turned over to police authorities, the adult should try to protect the student from self-incrimination. At that point, the school representative is acting no longer in loco parentis but as an agent of the police, and the investigation should be halted until the student's parents or guardian and possibly an attorney are present. The same consideration, avoiding self-incrimination by the student, arises when police are actually present either because they have sought the student at school or because they have been summoned. In that case the police are representing the public's interest, and the school employee should represent the student's interest until his parents are available to do so.[26]

To Inform the Student of Possible Consequences of His or Her Drug Use and Some Sources of Help. A third choice is to advise rather than discipline or prosecute. School personnel should know in general, so as to be able to advise students, the nature of the legal penalties for drug use. They should also be aware that minors who are first offenders will probably be treated leniently,[27] that North Carolina allows minors to consent to their own treatment for substance abuse,[28] and that both state[29] and federal laws[30] protect the confidentiality of the treatment.

25. This point is emphasized because of the considerable number of school personnel who mistakenly believe that state law requires anyone who knows of a crime to report it.

26. A. Dellinger, North Carolina School Law: The Principal's Role 26-28, (Chapel Hill, N.C.: Institute of Government, 1981), citing Wetterer, *Emergency Situations Involving Alleged Student Crime*, in R. Stern, ed., The School Principal and the Law 182-83 (Topeka, Ks.: NOLPE, 1978).

27. N.C. Gen. Stat. § 90-96 (1981 Supp.), conditional discharge and expunction of records for first offense; *id.* § 90-96.1 (1981), immunity from prosecution for minors.

28. *Id.* § 90-21.5.

29. *Id.* § 90-109.1(a).

30. Drug Abuse Office and Treatment Act, 21 U.S.C. 1175 (1974); Comprehensive Alcohol Abuse and Alcoholism Prevention Treatment and Rehabilitation Act, 42 U.S.C. 4582 (1974), and regulations thereunder, 42A C.F.R. 2.1 et seq. (1975).

Sexually Transmitted Diseases

Another stigmatizing condition with a high incidence among minors is sexually transmitted disease (hereafter STD). As used here the term refers primarily to syphilis and gonorrhea; no official statistics are kept on herpes, since there is now no effective prevention or cure for that disease. STD is a serious national problem, particularly severe in the Southeast. For purposes of reporting STD, the U.S. Department of Health and Human Services divides the nation into ten areas. Among these the Southeast ranks first in the incidence rate for gonorrhea and third in the incidence rate for syphilis. Within the eight-state Southeast region, North Carolina is above the median (fourth) for both diseases.[31]

North Carolina keeps statistics on the prevalence of STD among persons 19 and younger. In 1981 there were 111 reported cases of syphilis and 12,196 reported cases of gonorrhea in that population. The gonorrhea cases included 72 children nine or younger and 435 children between 10 and 14.[32] It is certain, then, that students in every school unit face the problem, and frequently under circumstances in which parents will not be helpful. Among young children, parental abuse or neglect has often caused the condition, while older children often conceal this kind of illness from their parents.

Whereas school officials have a certain degree of latitude in dealing with illegitimate pregnancies and substance abuse, they have no choice but to act when a case of STD comes to their attention. G.S. 130-82.1 requires a principal "to notify the local health director of any person within his school . . . whom he or his staff has reason to suspect of being afflicted with a disease declared by the Commission for Health Services to be reportable," a category that includes STD. Health directors have broad statutory authority to deal with STD, including the power to examine anyone "reasonably suspected of being infected"; to detain, isolate, or quarantine when necessary; and to insist that an infected person report for treatment until his disease is no longer communicable. The law also requires them if possible to find the sexual contacts of a person with STD in order to prevent further spread.[33] Moreover, a health director may expect

31. STD Statistical Letter 1980 (Atlanta, Ga.: U.S. Public Health Service, Center for Disease Control, March 1982).

32. Statistics supplied by James P. Fowler, Jr., Head, Venereal Control Branch, N.C. Department of Human Resources, September 1982.

33. N.C. Gen. Stat. § 130-96.

school staff to cooperate with him in the performance of his duties. Reasonable cooperation could be expected to include conveying messages or items left for students by health workers and allowing the workers access to students during school hours.

Counseling

Dealing with health problems presents school personnel with numerous opportunities for counseling students and parents. Either the formal screening programs or a teacher's own observation of a child may spot a health problem that must be pointed out. In fact, school employees would probably incur liability if they ignored obvious problems. Certainly the most troubling case from the "educational malpractice" area involved misdiagnosis of a health problem.[34] This is a legal issue that schools should be aware of even though no judgment for educational malpractice has yet been affirmed.

Also, students often will confide to a school counselor or other confidante problems that the counselor would otherwise not know about. If the student agrees that his or her parents should be informed, the school's responsibility is discharged by doing so unless (rare) the parents seem unable or unwilling to assume responsibility.[35] Troublesome issues arise, however, when a student refuses to consult his parents and asks that his school confidante not do so. How should this situation be handled?

As a practical matter, a student's request for confidentiality may fare variously, depending on the category of school employee confided in. School administrators, teachers, nurses, and guidance counselors may react differently, the first two groups being probably more likely to call in parents (of course, individuals within each group also react differently). Such requests trouble any adult who works in a school setting because that person recognizes professional responsibilities to both students and parents. Nurses, however, have a legal obligation to maintain confidentiality as part of the doctor-patient privileged relationship.[36] Guidance counselors do not have a clear legal mandate,[37] but the ethical standards of their professional organization do require that confidences be kept in most circumstances.[38] Although differences in confidantes' responses are understandable—even justified—they are regrettable from the students' viewpoint. Without eliminating the variation, school officials could minimize its harmful effects by working toward agreement on who will divulge what to whom under what circumstances and then communicating that general understanding to the student body.

As a legal matter every school employee should breach certain kinds of confidences—namely, those that pose danger to the student or other persons if concealed. Obvious examples are the student who is homicidal or suicidal or refuses essential medical treatment, but other instances (for example, those that involve students who are pregnant, or abusing drugs, or depressed) are harder to resolve. In several recent cases courts have found a duty to breach confidences in order to warn potential victims of assault.[39] Although in each instance the person confided in was a psychiatrist, nothing in the courts' reasoning would prevent extension of the principle to school professionals. As for the student who threatens his own well-being, the school's general obligation to protect students[40] would seem to require revelation. (Professional guidelines for guidance counselors also recognize the duty to reveal under threat of danger.[41])

---

34. Hoffman v. Bd. of Educ. of City of New York, 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979). The case involved a normally intelligent child with a speech defect who was classified as mentally retarded for eleven years. Trial and intermediate courts awarded substantial damages, but the highest state court reversed 4 to 3.

35. The school's duty is not discharged if parents make no effort to deal with a continuing health problem of some severity. In such cases school officials should report a possible instance of child neglect to the county social services department. N.C. GEN. STAT. § 7A-517(21) defines "neglect" as including failure to provide necessary "medical care and other remedial care."

36. While the statute regarding the privilege (N.C. GEN. STAT. § 8-53) refers only to admissibility of medical information in court, case law establishes a doctor's (and therefore a nurse's) obligation not to divulge information without the patient's consent in most other settings. See *Breach of Confidence: An Emerging Tort*, 82 COLUM. L.R. 1428-30 (1982), and cases cited therein.

37. North Carolina law establishing a school counselor's privilege (N.C. GEN. STAT. § 8-53.4) merely prohibits testimony by counselors in court. The author is unaware of case law creating a counselor's duty not to divulge.

38. AMERICAN PERSONNEL GUIDANCE ASSOCIATION. ETHICAL STANDARDS Section B (2) (Washington, D.C. rev. ed. 1974) (hereafter APGA STANDARDS).

39. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979); Mavroudis v. Sup. Ct., 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1981); Bradley Center, Inc. v. Wessner, 287 S.E.2d 716 (Ga. App. 1982).

40. PROSSER, LAW OF TORTS 337-38 (3d ed.).

41. APGA STANDARDS, Section B (4): "When the counselee's condition indicates that there is clear and imminent danger to the counselee or others, the member is expected to take direct personal action or to inform responsible authorities."

Except in the special circumstance of danger, school personnel probably may honor a student's request not to inform parents—and perhaps should do so. A recent law review article arguing for judicial recognition of breach of confidence as a separate tort (legally compensable injury) included confidences made to school authorities among those to be legally protected.[42] Then too, as noted above, the school nurse is probably bound to keep confidences as part of the doctor-patient relationship, especially in light of North Carolina's recognition of minors' rights to confidential treatment for certain conditions. When the medical problem confided to a nurse is one of those covered by G.S. 90-21.5 (pregnancy, communicable disease, substance abuse, or emotional disturbance), the nurse should not breach the confidence unless there is danger. G.S. 90-21.4(b) forbids a physician to take the initiative in contacting parents concerning these medical conditions. The prohibition applies equally to nurses, who must always function under the general supervision of a physician. The statute gives the physician permission (though it does not require him) to reveal when contacted by parents; a nurse who is contacted by parents should refer the decision to the supervising physician. Guidance counselors, though not clearly bound by law, are, as noted earlier, advised by their professional standards to keep confidences. For other school employees, however, neither law nor policy resolves the dilemma of divided loyalty—a clear and primary duty to students co-existing with an implied duty to support parental authority. Because of the conflict, schools may elect to minimize their participation if a student wishes to handle a health problem alone. At a minimum every school employee should know what local agencies will help a student with particular problems (primarily, the health department) and that those agencies will in most cases honor a request for confidentiality. The employee can then offer this information to students in general or to specific students who ask for help.

Some school systems and employees go further by helping students procure medical services, often without parents' knowledge. The school or an individual school employee may provide transportation between school and the health department for a student who is visiting the STD or family planning clinic, or may even accompany a student when she obtains an abortion. Such an action, though well intentioned, increases a school employee's exposure to litigation and potential liability. There are obvious risks involved in the additional transportation. Furthermore, a parent whose child received inadequate medical care or care that he considered inappropriate could raise the issue of the school's responsibility for obtaining proper care.

Records

It was suggested above that a few school employees should (nurses and possibly guidance counselors) and some others will choose to advise students on health problems that they are concealing from their parents. This situation requires consideration of the school's obligations under the Family Educational Rights and Privacy Act (FERPA),[43] the federal statute that gives parents broad access to information compiled by a school concerning their child. School employees may wonder whether the act gives parents access to all medical information, thus eliminating the possibility of confidentiality.

The answer is no—access to confidential health information is not always required. First, FERPA does not cover notes or records that are made by a single school employee and not shared with any other person. These are not considered "school records" and therefore need not be shown to parents. Thus, if a teacher notes a conversation with a student who asked for help and was advised to visit the health department, she has not created a "school record" unless she shows the memorandum to another person. FERPA regulations specifically state that school counselors' records may be kept confidential, and the regulations apply also to any other school employee who offers counsel. Second, FERPA is limited: it applies only to *records*, not to all information about students obtained by any means. When school employees learn of students' problems through observation or conversation with the student or others, no written record is made, and therefore FERPA does not govern the collection or dissemination of the information.[44]

42. *Op. cit. supra* note 36. But the author relies on a single district court case, Blair v. Union Free Sch. Dist. No. 6, Hauppauge, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (1971)—a case that did not involve a student's request that information be kept from parents.

43. 20 U.S.C. § 1232g (1978).

44. This point is sometimes misunderstood. One superintendent has instructed his employees that FERPA prevents their telling health department employees which students are pregnant. In fact, however, FERPA would rarely be an issue, since school employees would probably learn of pregnancies not from school records but from direct observation or oral communications.

Conclusion

Health maintenance is only one of the responsibilities subsidiary to education that fall on school personnel. Although not the school's primary mission, student health must be among its concerns because students are minors (by definition not fully responsible for themselves) who spend the majority of their day under the school's supervision. Inevitably, health problems arise and must be dealt with.

The discussions in this *School Law Bulletin* and the last one by no means exhaust the range of legal issues affecting health services in the schools. Topics not covered in either *Bulletin* include the handling of medication,[45] regular treatment of chronically ill or handicapped children at school, procedures for emergency treatment at school or elsewhere, and health hazards within the school environment. These articles may, however, clarify the legal obligations of school and health department staff, students, and parents in certain areas in which each group needs the cooperation of the others to insure a satisfactory school health program.

45. See Solberg, *Administering Medications in the Schools*, 11 SCHOOL LAW BULLETIN (January 1980).

Recent Court Decisions

FEDERAL AGE DISCRIMINATION ACT VOIDS STATE MANDATORY RETIREMENT STATUTES. *EEOC v. Wyoming*, 51 U.S.L.W. 4219 (Sup. Ct. March 2, 1983).

Facts: The Age Discrimination in Employment Act of 1967 makes it unlawful for an employer to discriminate against any employee or potential employee between the ages of 40 and 70 on the basis of age, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." In 1974 the act was extended to include state and local governments. A Wyoming game warden who was involuntarily retired at age 55 pursuant to a Wyoming statute filed a complaint with the EEOC, alleging violation of the act. The Commission ultimately sued in federal district court, seeking relief on behalf of the retired employee and others similarly situated. The court dismissed the suit, holding that insofar as the federal act regulated Wyoming's employment relationship with its game wardens and other law enforcement officials, it violated the doctrine of immunity provided by the Tenth Amendment that was articulated in *National League of Cities v. Usery* [426 U.S. 833 (1976)]. That case struck down the congressional attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments.

Holding: In a 5-4 decision written by Justice Brennan, the Supreme Court reversed the district court by finding the 1974 extension of the Age Discrimination Act to cover state and local governments to be a valid exercise of congressional powers under the commerce clause. It said that the power was not limited by external constraints imposed by the Tenth Amendment. The purpose of the Tenth Amendment immunity articulated in *National League of Cities* is to protect states from federal intrusions that might threaten their "separate and independent existence." A claim that congressional commerce legislation is invalid can succeed only if it meets a three-part test established by the Supreme Court in 1981. The challenged statute is invalid only if (1) it regulates the "States as States," (2) the federal regulation addresses matters that are indisputably "attributes of state sovereignty," and (3) the states' compliance with the federal law would "directly impair their ability to structure integral operations in areas of traditional governmental functions" [*Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1982)]. The majority said that the third test did not apply in the instant case because the act does not "directly impair" the state's ability to structure integral operations. The act does not require the state to abandon its goal of assuring physical preparedness of game wardens, the majority declared, because the state can assess the fitness of its wardens individually and dismiss those found to be unfit.

The dissent—written by Chief Justice Burger and joined by justices O'Connor, Powell, and Rehnquist—strongly disagreed with the majority's application of the three-prong test, saying that all three requirements were

met and thus the act was unconstitutional as it applied to the states. All nine justices conceded the first point—the statute must regulate the "States as States." The majority did not consider the second prong—the act regulates attributes of state sovereignty—but the dissenters said that it interfered with Wyoming's attempt to assure the physical preparedness of state employees who must enforce the laws. This goal, they said, was an attribute of state sovereignty. In addition, Burger noted that over half the states have mandatory retirement laws based on similar objectives that are now invalidated by the act. The dissent also found that the third condition had been met—compliance with the federal law would impair integral operations in what has traditionally been a state function. With each prong of the test met, in its view, the dissent inquired finally whether "the federal interest advanced [is] such that it justifies state submission." In applying this balancing test, it said that Wyoming was asserting a right to set standards to meet local needs and that the "Commerce Clause powers are wholly insufficient to bar the states" from attempting to prevent the dangers of forest fires and law violations by officers whose reflexes are too slow to react because of old age.

LIMITED PUBLIC ACCESS TO SCHOOL MAIL FACILITIES. *Perry Education Association v. Perry Local Educators' Association*, 51 U.S.L.W. 4165 (U.S. Sup. Ct. Feb. 23, 1983).

Facts: Rival teacher unions in an Indiana school district, the Perry Education Association (PEA) and Perry Local Educators' Association (PLEA), both had access to teachers' mailboxes and the interschool mail system. In 1977, however, the school board and PEA signed a collective-bargaining agreement after an election in which PEA was chosen to be the exclusive bargaining representative for the school district's teachers. In the new contract PEA obtained exclusive access to the interschool mail system and teachers' mailboxes, although both unions had access to bulletin boards, the public address system, and schoolrooms for after-school meetings.

PLEA sued in federal district court, contending that the preferential access to the internal mail system violated its rights of free speech under the First Amendment and the equal protection clause of the Fourteenth Amendment. The court entered summary judgment for the defendants (PEA and the school board members), but the Seventh Circuit Court of Appeals reversed. PEA appealed the reversal.

Holding: In a 5-4 opinion written by Justice White (Burger, Blackmun, Rehnquist, and O'Connor concurring), the Court reversed, holding that the First Amendment was not violated by the preferential access given in the collective bargaining contract. It examined the First Amendment as it applies to public property and said that there are three categories of public property, each with a different access. The first category consists of places that by long tradition or government fiat are devoted to public assembly and debate—streets and parks are examples. In these places the state's right to limit speech is sharply circumscribed. The second category consists of property that the state has opened to the public as a place of expressive activity, like a univerity meeting facility or a school board meeting. Once the forum is opened, even if it was not originally required to be opened, the First Amendment greatly limits state power in restricting access to it. The third category is public property that is not by tradition or designation a forum for general communication. The fact that this property is owned or controlled by the government does not mean that the First Amendment guarantees access to it. The school's mail facilities fall into this third category, the majority said.

The plaintiff (PLEA) argued that the mail facilities belong to the second category—that they are a "limited public forum" created by the periodic use of the system by private groups not connected with the schools (YMCA, Scouts, civic and church groups) and by PLEA's own unrestricted access before PEA was certified as exclusive bargaining representative in 1977. The Court rejected the argument, saying that the selective access did not transform the mail facilities into a public forum. It found the differential-access policy to be consistent with the school district's legitimate interest in preserving labor peace between rival unions, in keeping the school mails generally limited to the use for which they were created, and in enabling PEA to perform effectively its statutory obligations as exclusive representative of all teachers. The reasonableness of the limited-access policy is also supported, the Court said, by the substantial alternative channels that remain open to PLEA for communicating with teachers. Furthermore, PLEA is assured of equal access to all modes of communication, including the mail system, when a representation election is conducted. The Court also rejected the equal protection argument, finding that the school policy furthered a legitimate state purpose in a rational manner.

In a strident dissent written by Justice Brennan (Marshall, Powell, and Stevens joining), the minority said that the exclusive-access provision in the collective-bargaining agreement amounted to viewpoint discrimination that infringed PLEA's rights without advancing any substantial state interest.